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FOREST RESERVES.

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CORRESPONDENCE IN RELATION TO THE POWERS OF CONGRESS OVER FOREST RESERVES SITUATED IN THE VARIOUS STATES, PUBLISHED BY ORDER OF THE HOUSE OF REPRESENTATIVES.

HOUSE OF REPRESENTATIVES,
Washington, December 5, 1901.

MY DEAR SIR: In furtherance of my verbal inquiry in regard to your views upon the subject of forestry legislation, I wish to obtain the benefit of your views upon the constitutional powers of Congress to control the various forest reserves where they are situated in the States.

1. As to those reserves situated in the Territories, it seems to me quite clear that Congress can accept the Territorial laws or can modify or change them at pleasure, and that those reserves are clearly within the jurisdiction of the Congress.

2. As to the enactment of Federal laws to punish the setting out of fires or trespasses in cutting or injuring the timber, I would be pleased to have your views as to what constitutional limitations within the limits of the States would interfere. In view of the permanent withdrawal of these forest lands for a general national purpose, would the powers of regulation and control be greater than those which may be exercised in the preservation and management of ordinary public lands open to entry or settlement where the same are covered with timber?

The questions involve the general power of enacting statutes punishing the persons who may injure the forests as well as making and enforcing regulations for their care.

3. In these forests the wild game have opportunities to breed and find shelter.

An enlightened public sentiment, though unfortunately too tardy in its development, has finally led to the enactment of very efficient and adequate game protection in nearly all the States and Territories, which laws, if suitably enforced, would in most instances give adequate protection. But unfortunately in many localities these laws are either wholly or in part disregarded. The President in his message has asked for the enactment of laws creating game preserves in these forest reserves.

This recommendation involves the question as to the extent of Congressional power and also the choice of methods.

If Congress has no power or control over the subject within the limits of a State it has unquestioned authority, in my judgment, to prevent interstate commerce in the dead bodies or living creatures themselves.

This control Congress has already asserted in the Federal law prohibiting transportation from one State to another of such game when killed in violation of State laws.

In the disposition of this question in the forest reserves the custodians of the forests might be directed to make complaints and enforce proceedings under the local statutes, thus supplementing the efforts of the State authorities. On the other hand, special Federal statutes might be framed, if constitutional power exists, to deal directly with the question.

Indirectly, protection might be furnished by preventing trespass of all kinds during certain seasons, and thus give incidental protection to the wild inhabitants of these national forests during certain portions of the year.

In this borderland of State and national authority I regard it as of the utmost importance that the legislative should keep in view the rights and powers of the States and that care should be exercised to avoid conflict of jurisdiction where so much depends upon having the laws backed up by a friendly local public sentiment.

I would be gratified to have the benefits of your judgment as to how far legislation on these various subjects would be within the constitutional domain of the Congress.

Very respectfully, JOHN F. LACEY.

Hon. P. C. KNOX,
Attorney-General United States.

DEPARTMENT OF JUSTICE,
Washington, D. C., January 3, 1902.

SIR: Complying with the request therefor contained in your note of December 5, 1901, I here transmit to you some of my views upon the questions there suggested. These questions are as to the power of Congress to enact laws for the protection and control of or relating to our national forest reserves when within the limits of a State, and specifically to make such reserves, to some extent, refuges for the preservation of the remnant of the game in those localities. They necessarily involve, also, substantially the same questions as applicable to the general public domain, for so far as concerns the question of Federal legislative power no difference in principle is perceived.

I quite agree with you that as to those reserves situated within a Territory of the United States this Federal legislative power is ample, and the questions are those arising when such reserves are within the limits of a State; but in order to the determination of those it may be well to refer briefly to the nature and source of this Federal power over the Territories.

As to the source of this power there has been a diversity of opinion, and the power is claimed to have arisen from that provision of the Constitution which gives Congress the "power to dispose of, and make all needful rules and regulations respecting, the territory and other

property belonging to the United States;" and other sources of this power have been suggested; but, whatever its origin, the existence of this power, as the Supreme Court has several times said, is undoubted.

While, in the Dred Scott case (19 How., 393), it was held that this constitutional provision applied only to such territory as the United States then had and did not apply to that subsequently acquired by treaty or conquest, this has not been acquiesced in in later cases, several of which point to this provision as, at least, one of the sources of the power and control which Congress exercises over the various Territories. And, I think, it may be taken as now settled that this provision confers upon Congress the power stated over all the Territories.

Congress, then, having sovereignty and ample legislative control of the Territories while they are such and of the public lands therein, one important question is how far this sovereignty and right of control is surrendered to the State by its admission into the Union. And here we may look again to the Constitution, then to the acts admitting such States, and to their constitutions when admitted.

And, first, as to the Federal Constitution. Assuming, as I think we may, that the provision above referred to applies to all "territory and other property belonging to the United States," whether then already or subsequently acquired, what was the intended limit of the duration of the power thus conferred? Was it intended to continue only until the new State was admitted, and to then cease and leave Congress and the Government without any power to "dispose of" or to "make needful rules and regulations respecting" the public lands or "other property" belonging to the United States, or was it intended to continue as long as its subject-matter and its necessity continued? If the former, we must look to some other source for the power of Congress to dispose of and regulate the management of the public domain within the limits of a State. If the latter, then this provision is ample.

I do not consider here the case of military forts, posts, dockyards, etc., for which special provision is made in the Constitution, nor sites for post-offices, court-houses, etc., the question of jurisdiction over which is generally settled by convention.

When the Constitution was adopted, we had but one Territory, though it is fair to suppose that others were looked upon as possible; but the one that we had was acquired under conditions which required its admission into the Union in not less than three nor more than five States, with equal sovereignty with that of the original States, and the Constitution provided for the admission of new States. Thus, with the subject of new States directly in mind, did the framers intend to give Congress power to dispose of and manage the public lands while in a Territory and to leave it without the power to do either after a State was admitted? For it could not have escaped them that to confer this power while the Territory remained such was, by the strongest implication, to deny it afterwards. Did they intend this?

In the first place—and this is quite sufficient for its construction—the provision itself imposes no limitation, either of time or of Territorial or State condition; nor does the nature of the power conferred imply any such limitation. On the contrary, the power is as broad and general as language could make it, with no limitation whatever, either expressed or implied. And the reason and necessity for the

power are tenfold stronger after the admission of the State than during the existence of the Territory; and there is no rule of law or of construction which will permit us to impose a limitation which neither the instrument itself nor the nature of the power imposes or implies. And the general rule is that when a power is conferred without limitation, express or implied, it continues as long as the necessity for its exercise. And the Supreme Court has more than once said (as in Gibson *v.* Choteau, 13 Wall., 92, on p. 99) "That power is subject to no limitations."

The difficulty and misconstruction here arises chiefly from the use, in this clause, of the word "territory." If, instead, the expression had been that Congress should have power to dispose of and make all needful rules and regulations respecting the land and other property, there could have been no question but that this power of disposition and control continued after statehood as before. But this is exactly what the provision does mean. It does not refer to organized Territories, as to which the term "dispose of," and make "rules and regulations," and "other property" are not appropriate; but it refers to land and other property. And this is expressly held in United States *v.* Grotiot (13 Pet., 526), where it is said (p. 536):

> The term territory, as here used, is merely descriptive of the kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation.

This of itself would seem to make the meaning fairly certain. Consider the situation. After a long struggle, which had long delayed the adoption of the Constitution, the people had finally settled the ownership and sovereignty of the lands outside of the States in the General Government. It was claimed that as this territory had been wrested from Great Britain by the blood and treasure of the people of all the States it should be held for their common benefit, and not for any State, and it was finally so settled and agreed and the whole territory ceded to the United States for the common benefit of all. At that time, next to State jealousy of Federal power—if second to even that—there were mutual State jealousies of the power of each other, and this was one of the causes of the dispute over the public territory, and yet it was certain and well known that on the admission of the expected new States, with their sovereignty within their borders, all of the sovereignty and control of this territory within their borders which was not in the United States would be in those States, respectively, and that that sovereignty and control which they had so long struggled to place in the United States would be passed over to these three to five States as they were admitted. This was certain to be the case, for if Congress did not have this sovereignty and control after a State was admitted, then the State did have it, and no other State could interfere.

These States might then, by unfriendly legislation or by no legislation, or both, so hamper these lands, their sale, occupancy, and control as to render them of little value except to those States and their people. It is simply incredible that this was intended. If it was not, then it was intended that this vital power of disposal and control should continue at a time when, of all others, it was most needed. While the Territory remained such the sovereignty of the United States was complete without any other grant than that contained in

the cession, and this special grant of power was not at all necessary. Its chief if not its only use and purpose was that, when and after these lands passed into and under the sovereignty of a State, they should do so subject to the paramount sovereignty of the United States so far as was needful.

In framing this dual government, this imperium in imperio in which each State was to be in many respects sovereign in the nation, and the nation in many respects sovereign in each State, the separation of these sovereignties and their lines of demarcation must have received the most careful attention of those statesmen as one of the most important and difficult problems which confronted them. And, as the control and disposal of this Territory was one of the most important and burning questions of the time, and had long been such, delaying and, for a time, endangering the adoption of the Constitution, it would seem impossible that when dealing directly with this question provision was made for this control while in a Territorial state, and when it was little needed, and purposely omitted at a period when, of all others, it was most needed. We shall come nearer to the real meaning of this provision by reading it as it is so plainly written, without any limitation, either of time or Territorial or State condition.

If authority for this construction be needed it is not lacking, and in another connection I shall refer to some cases which come first to hand.

Assuming then, as I think we must, that this constitutional provision confers upon Congress the power of disposition and control of the public lands after the admission into the Union of the States containing them, how much, if any, of this power is surrendered to the States by the acts admitting them into the Union as sovereign States? And here the general rule is certain (although questions may arise as to its application to particular cases). So far as its exercise is needful to the disposition and full control and management of these lands, Congress has always been and is incapable of diverting, alienating, or surrendering any part of it. It is uniformly held that while the title of the United States to the public lands is absolute as against every other title, yet it is held in trust for the ultimate benefit of all the people in such manner as may be prescribed by law, and this is peculiarly the case as to the only Territory we had at that time. Congress then, being a trustee of the title, can not divert, alienate, or surrender any power necessary or proper for the disposal, protection, preservation, control, or management of its lands, nor in anyway discharge itself from the duty of executing the trust confided to it.

But while this power to make all needful rules and regulations is also the power to determine what are needful, and while, therefore, this power so conferred is, in terms absolute and unlimited, yet, notwithstanding some general statements of the Supreme Court, it may be well claimed that, after the admission of a State, there is necessarily a limit arising from other portions of the Constitution and the general powers of the State. For example, may Congress continue to legislate for this public land—some of it, perhaps, in small, isolated quantities—upon all subjects of municipal legislation, civil and criminal, and irrespective of the laws of the State upon the same subjects, as it does, for example, in the District of Columbia? Or, on the other hand, is the power of Congress within a State limited to such acts, legislative or otherwise, as are required for the disposal, protection, and control

of such lands? Or is there, between these, a limit to Federal power, legislative or executive? It is not necessary to discuss here the first of these questions, for no such general legislation is contemplated, and the other two, and also how far Federal control has been surrendered by acts admitting States into the Union, may be examined in the light of another consideration, viz, the rights incident to ownership.

Subject to the eminent domain of the State, the collection of taxes, the service of process, and other kindred superior rights the ownership of land carries with it, as incident to and a part of such ownership, the right of exclusive possession and control, which includes the right to forbid and prevent intrusion thereon for any purpose and to prevent and remove trespassers. The owner may forcibly prevent such intrusions if he can, or he may apply to the courts for relief or to recover damages. But a private individual may not himself enact laws for the protection of his property or to punish trespassers upon his lands. Is the United States in the same situation as to its lands within a State? Is it without power to itself enact laws for the disposal or management of its public lands within a State, or for their protection from fires, or the preservation of its timber or minerals thereon? This is undoubtedly the case, if the United States, as to such lands, has no other rights than those of an ordinary proprietor.

And it must be admitted that much that is said by the court in Fort Leavenworth Railroad Company *v.* Lowe (114 U. S., 525) is directly to the effect that as to lands within a State, unless jurisdiction is reserved in admitting a State, or the land is acquired by the United States with the consent of the State for military purposes, etc., as provided in the Constitution, the United States has no other rights than those of an ordinary proprietor, and that, like other lands, they are subject to the sole jurisdiction and sovereignty of the State. And it is in view of this that I discuss this question more elaborately than I otherwise would. But, if what is there said is to be considered as a denial of all legislative power of Congress over such lands, not only is it opposed to the uniform practice of the Government from the beginning, with the frequent approval of that court, and to many contrary declarations of that court, but the contrary is directly held in later cases.

But what is said in that case must be read with reference to and in the light of the case then before the court. The question in that case was that of the exclusive jurisdiction, or not, of the United States over that part of the reservation not used for military purposes. Upon the admission of Kansas no reservation of Federal jurisdiction was made, but later the State ceded that jurisdiction to the United States with this saving clause, viz, the right to serve civil and criminal State processes therein, and "saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property on said reservation." The State levied a tax on a railroad on this reservation, and the question of its power to do so depended upon whether the reservation was in the exclusive jurisdiction of the United States. The court held that, inasmuch as it was not purchased with the consent of the State "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," under clause 17, section 8, Article I, of the Constitution, the United States had no such exclusive jurisdiction, and that, under this saving clause, the State had power to tax the rairoad property; and that the only way by which the United States could acquire this exclusive jurisdiction within a State

was that provided by the Constitution, viz, by purchase with the consent of the State.

The question of concurrent jurisdiction or of Federal jurisdiction for some purposes, was not discussed nor even mentioned, for it was not involved. Nor was any allusion made to that other constitutional provision giving to Congress the power to make needful rules, etc., which certainly gave to Congress much greater power than is possessed by an ordinary proprietor. And, if the court decided that it did not do so, or did not apply to lands within a State, or decided anything else upon a question of such vast importance, it did so sub silentio by saying nothing about it. That is not the way in which that court settles questions of such importance.

From the beginning the whole policy and practice of the Government in respect of its public lands has been based upon the generally unquestioned power of Congress to legislate for their disposal, management, and protection, in both Territories and States, and with the frequent approval of the Supreme Court. It is needless to refer to these various acts of legislation as to lands in States and Territories. Their name is legion, but each and every one of these acts was the assertion and the exercise of Federal jurisdiction and sovereignty, and of a right far superior to that of any mere proprietor as to lands within a State.

This must have been either because, in the admission of the State, the jurisdiction necessary for that purpose was either expressly or impliedly reserved—the latter of which is not probable—or because the constitutional provision referred to confers that power, and this would seem a quite sufficient source of power.

In Gibson *v.* Choteau (13 Wall., 92) it is said in the syllabus that "the power of Congress in the disposal of the public domain can not be interfered with, or its exercise embarrassed by any State legislation." And on page 99, "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations." Nothing could be more conclusive that this constitutional provision applies also to lands within a State, and that the legislative power thus conferred is paramount.

In Jorden *v.* Bennett (4 How., 169) it is said (p. 184):

> By the Constitution Congress is given power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, for the disposal of the public lands. Therefore, in the new States where such lands be Congress may provide by law, and having the constitutional power to pass the law, it is supreme. So Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitation or otherwise, can defeat such title.

This was the holding of the Supreme Court up to the time when the Fort Leavenworth case was decided, and it is not supposable that that court intended to then overrule these cases and deny this legislative power of Congress and all other powers save such as belong to an ordinary individual proprietor, while making no reference whatever to its previous holdings. That it did not so intend is manifest from the only other case which I shall cite upon this question, that of Camfield *v.* United States (167 U. S., 518), where it is said in the syllabus:

> The Government of the United States has, with respect to its own lands within the limits of a State, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers; and may legislate for their protection, though such legislation may involve the exercise of the police power.

And on pages 524, 525, the powers of the Government, both as an individual proprietor and as a sovereign, are well stated:

> The lands in question are all within the State of Colorado. The Government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as any private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preemption or homestead settlement, but it would be recreant toits duties as trustee for the people of the United States to permit any individual or prvate corpora tion to monopolize them for private gain and thereby practically drive intending settlers from the market.

And on page 525:

> The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public or of intending settlers to forbid all inclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less valuable for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we not undertake to say that Congress has the unlimited power to legislate against nuisances within a State which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation.

This, so manifestly the correct doctrine, would seem to cover and to settle the whole question and to authorize the proposition that, as to public lands within a State, the Government has all the rights of an individual proprietor, supplemented with the power to make and enforce its own laws for the assertion of those rights and for the disposal and full and complete management, control, and protection of its lands.

Among these undoubted rights is the right of absolute or partial exclusion, either at all or at special times and for any or for special purposes.

While Congress certainly may by law prohibit and punish the entry upon or use of any part of these forest reserves for the purpose of the killing, capture, or pursuit of game, this would not be sufficient. There are many persons now on these reserves by authority of law, and people are expressly authorized to go there, and it would be necessary to go further and to prohibit the killing, capture, or pursuit of game, even though the entry upon the reserve is not for that purpose. But the right to forbid intrusion for the purpose of killing game is one thing, and the right to forbid and punish the killing, per se, and without reference to any trespass on the property, is another. The first may be forbidden as a trespass and for the protection of the property; but when a person is lawfully there and not a trespasser or intruder the question is different.

But I am decidedly of opinion that Congress may forbid and punish the killing of game on these reserves, no matter that the slayer is lawfully there and is not a trespasser. If Congress may prohibit the use of these reserves for any purpose, it may for another; and while Congress permits persons to be upon and use them for various purposes, it may fix limits to such use and occupation and prescribe the purpose and objects for which they shall not be used, as for the killing, cap-

ture, or pursuit of specified kinds of game. Generally, any private owner may forbid, upon his own land, any act that he chooses, although the act may be lawful in itself; and certainly Congress, invested also with legislative power, may do the same thing, just as it may prohibit the sale of intoxicating liquors, though such sale is otherwise lawful.

After considerable attention to the whole subject, I have no hesitation in expressing my opinion that Congress has ample power to forbid and punish any and all kinds of trespass upon or injury to the forest reserves, including the trespass of entering upon or using them for the killing, capture, or pursuit of game.

The exercise of these powers would not conflict with any State authority. Most of the States have laws forbidding the killing, capture, or pursuit of different kinds of game during specified portions of the year. This makes such killing, etc., lawful at other times, but only lawful because not made unlawful. And it is lawful only when the State has power to make it lawful by either implication or direct enactment. But, except in those cases already referred to, such as eminent domain, service of process, etc., no State has power to authorize or make lawful a trespass upon private property. So that, though Congress should prohibit such killing, etc., upon its own lands at all seasons of the year, this would not conflict with any State authority or control. That the preservation of game is part of the public policy of those States and for the benefit of their own people is shown by their own legislation, and they can not complain if Congress upon its own lands goes even farther in that direction than the State so long as the open season of the State law is not interfered with in any place where such law is paramount.

It has always been the policy of the Government to invite and induce the purchase and settlement of its public lands, and as the existence of game thereon and in their localities adds to the desirability of the lands and is a well-known inducement to their purchase, it may well be considered whether, for this purpose alone and without reference to the protection of the lands from trespass, Congress may not, on its own lands, prohibit the killing of such game.

Your other questions relate to the method of enforcing these Federal powers, if they exist, to the nature and kind of laws therefor. While such questions are peculiarly for Congress, yet, as you request it, I will suggest what occurs to me.

You very properly suggest the power of Congress over interstate commerce as tending indirectly to this end, by prohibiting interstate transportation of game, living or dead, or of the skins or any part thereof. There is some legislation upon that subject. I do not take the pains to examine this to see how sufficient it is; but if not already done something to the end desired may be accomplished in this way, but as a remedy this would fall far short of what is required.

You allude also to the aid and cooperation of forest rangers and those in charge for the enforcement of State laws. This would be well and especially so in the way of securing good feeling and harmonious action between Federal and State authorities. There is a provision for that in the act of March 3, 1899 (2 Sup. Rev. Stats., 993), but it simply imposes a very general duty, and should be more specific as to what acts are required to be done.

In this connection, and with reference also to the general protection of these reserves and the other public lands from fires, cutting timber,

killing game, and other depredations, I would suggest, in view of the existing law as to arrest without a warrant, whether it would not be well to give marshals and their deputies, and the superintendents, supervisors, rangers, and other persons charged with the protection of these reserves power, on the public lands, in certain cases approaching "hot pursuit," to arrest without warrant.

Complaints come to this Department that very often the place of illegal acts is so far from the office of any magistrate, and the means of communication such, that before formal complaint can be made and an officer with a warrant sent there the offenders are beyond successful pursuit. I commend this to your consideration. No matter what laws we may have for the protection of these reserves, the public lands generally, or the game, they would be in a very great many cases wholly inefficient, owing to the impossibility, under the present law as to arrests, of their enforcement.

There are already many statutes against setting fires and trespassing upon the public lands. Perhaps these are sufficient, so far as laws go. I do not examine this; but as to the protection of game on forest reserves drastic laws for that purpose, together with better means, as above suggested, for their enforcement, are required.

I would suggest the making it an offense to enter or be upon or use any portion of a forest reserve for the purpose or with the intent to kill, capture, or pursue (certain specified kinds of) game, or to kill, capture, or pursue with intent to kill or capture such game, on any portion of such reserve, and I would do this for the whole year as to some kinds of game, at least, and make such killing, capture, or pursuit the evidence of such purpose or intent. The latter clause, as you will see, proceeds against the act itself, irrespective of any trespass upon the lands, if, indeed, such act does not necessarily involve a technical legal trespass. But this may be questionable in case, for example, when one who is properly there, kills game. I would insert it at any rate, and it will, with the other, operate as a preventive.

Respectfully,

P. C. KNOX, *Attorney-General.*

Hon. JOHN F. LACEY,
House of Representatives.

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